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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 329

VINCENT R. MANCUSI, Warden, Attica State Prison, Attica, New York,

Petitioner,

against

BURTON N. PUGACH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1969

No. .....

VINCENT R. MANCUSI, Warden, Attica State Prison, Attica, New York,

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BURTON N. PUGACH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, the Warden of Attica State Prison, Attica, New York, in which respondent is presently incarcerated, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the case of the *United States of America ex rel. Burton N. Pugach* v. *Mancusi* (judgment entered on May 12, 1969). On petitioner's motion, the mandate was stayed by the Court of Appeals on June 11, 1969. Fed. R. App. Proc. 41(b).

Citations to the Opinion Below

The District Court opinion is unreported. It is reproduced as Appendix "A" to this petition. The opinion of the Court of Appeals for the Second Circuit is as yet unreported. It is reproduced as Appendix "B" to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on May 12, 1969.

The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Questions Presented

1. May respondent utilize federal habeas corpus to test the validity of electronic eavesdropping procedures conducted pursuant to the state statute only subsequently held unconstitutional by this Court in *Berger* v. *New York*, 388 U. S. 41 (1967)?

2. Is respondent entitled, on federal habeas corpus, to the benefit of the exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), since the conduct of which he complains occurred prior to the date of the decision in that case?

3. Does *Jackson* v. *Denno*, 378 U. S. 368 (1964) apply to respondent's case where concededly no objection was raised at trial to the voluntariness of any statements and where the alleged statements were not made while respondent was in custody?

Statement of the Case

On November 10, 1959, respondent and three others, Heard Harden, Walter McMillian and Al Smith Newkirk were indicted by a Bronx County Grand Jury for the crimes of burglary in the second degree, three counts of maiming, assault in the second degree, assault in the third degree and conspiracy as a misdemeanor. The charges arose from a plan formulated by respondent by which he, using Newkirk as an intermediary, hired Harden and McMillian to maim respondent's former girl friend, Linda Riss. The

plan was successfully executed on June 15, 1959 when Harden hurled lye into the faces of Miss Riss and her mother at the Riss apartment. McMillian was the driver of the escape car.

Respondent and Harden proceeded to trial without McMillian and Newkirk who had pleaded guilty and, on July 14, 1965, were found guilty on all counts. Respondent was sentenced, on March 14, 1962, to a term of from 7½ to 15 years on the burglary charge, to terms of from 7½ to 15 years on each of the maiming charges, to 2½ to 5 years on the assault second degree charge and 1 year each on the assault third degree and conspiracy charges, the imposition of the latter two sentences being suspended. The assault second degree sentence was made concurrent with the burglary sentence. The maiming sentences were made concurrent with each other but consecutive to the burglary charge, the aggregate sentence being 15 to 30 years in prison. The judgment of conviction was affirmed by the Appellate Division, First Department (*People* v. *Pugach*, 21 A. D. 2d 854 [1941]) and by the New York Court of Appeals (16 N. Y. 2d 504 [1965]). This Court dismissed respondent's appeal for want of a substantial federal question. *Pugach* v. *New York*, 383 U. S. 574 (1966).

During the state proceedings it developed that, pursuant to former New York Code of Criminal Procedure § 813-a, warrants had been obtained for the surveillance of respondent by both wiretapping and electronic eavesdropping procedures. The eavesdropping involved the placing of hidden microphones in respondent's law office. Respondent objected to the admission of any evidence obtained as a result of this surveillance at trial and on appeal.

It also developed at trial that respondent had indicated knowledge of the crime to two men in response to a demand from them for money to keep quiet about their knowledge. No mention was made at the trial that respondent's answers had in any way been coerced from him.

In the habeas corpus petition which was before the Court below, respondent raised, *inter alia,* the electronic eavesdropping and "confession" issues.* The petition was dismissed by the District Court for failure to exhaust state remedies in that respondent then had available to him a state remedy to test another of his claims, to wit, his alleged incompetence at the time he appealed from the judgment of conviction. By the time the appeal was heard by the Second Circuit, that issue had already been presented to the state courts, and in any event, the Second Circuit had held that the pendency of an issue in the state courts unrelated to any exhausted issue in the federal courts, did not bar habeas corpus relief on the exhausted, unrelated issue. *United States ex rel. Levy* v. *McMann,* 394 F. 2d 402 (2d Cir. 1968); *United States ex rel. Sniffen* v. *Follette,* 393 F. 2d 726 (2d Cir. 1968).

The Court of Appeals held with respect to the eavesdropping issue that *Mapp* v. *Ohio,* 367 U. S. 643 (1961) applied to the states the previous federal law that so-called trespassory eavesdropping was equivalent to an illegal search, that it had been struck down by *Silverman* v. *United States,* 365 U. S. 505, 512 (1961) and that respondent was entitled to the benefit of the exclusionary rule of *Mapp* v. *Ohio,* since his case was still being tried at the time of the *Mapp* decision. The Court said that the argument "equating trespassory bugs with searches was later sustained in *Berger* v. *New York,* 388 U. S. 41, 49-50, 54-56 (1967), which struck down the very New York statute that was the source of the authority for the eavesdropping here."

The Court of Appeals rejected the contention that *Berger* was not retroactive and held that *Kaiser* v. *New York,* 394 U. S. 280 (1969) was inapposite, since it involved wiretapping not eavesdropping. It further dis-

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* The wiretap issue, which was not raised, is presently the subject of a state habeas corpus proceeding by respondent.

tinguished *Katz* v. *United States*, 389 U. S. 347 (1967), held not retroactive in *Desist* v. *United States*, 394 U. S. 244 (1969) as involving non-trespassory eavesdropping. The Court held that trespassory bugging as a violation of the Fourth Amendment "was a foreseeable application of *Silverman*, and we see no reason to doubt that at least so much of *Berger* as insists on an adequate showing of probable cause is old Fourth Amendment law which *Mapp*, as explicated in *Linkletter*, makes applicable to the states in cases pending when *Mapp* was decided, as *Silverman* itself has been held to be."

The Court held that respondent was entitled to a hearing at which the state had the burden of showing that the judge who issued the warrant had other sufficient information before him either when the bugging was initially authorized or on the extensions of the authority to supply the elements of probable cause missing from the affidavit.* The Court left open the question of whether or not, even if the burden placed on the state was met, respondent might not be entitled to relief because of the duration of the bugging and the lack of particularity of the warrant. The Court also left open the question of whether or not the admission of evidence obtained by eavesdropping was harmless error.

The Court of Appeals also discussed the claim that certain admissions were allegedly coerced by the police because two men, who had previously spoken to the police, threatened to disclose what they knew about respondent if they were not paid off and respondent offered them some money and discussed the possibility of his involvement with them. The Court acknowledged that there was no argument at trial that these remarks were "the fruits

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* The Court of Appeals pointed out that the affiant is dead, while the judge who authorized the bugging is apparently alive. Subsequent information has disclosed that the judge who authorized the bugging is also dead.

of illegal coercion of respondent". The Court pointed out that during the pendency of his appeal, respondent did ask for a hearing with respect to his statement pursuant to *Jackson* v. *Denno*, 378 U. S. 368 (1964) and that this was refused. *People* v. *Pugach*, 14 N. Y. 2d 976 (1964). The Court held that both the possibilities of waiver and of coercion should be the subjects of a federal evidentiary hearing.

Reasons for Granting the Writ

1. The instant case conflicts with the prior decisions of this Court with respect to the retroactive application of newly announced decisions.

The eavesdropping in the instant case was conducted pursuant to warrants complying with former § 813-a of the New York Code of Criminal Procedure. Well after respondent's judgment of conviction became final, this Court held § 813-a to be unconstitutional in that it did not establish adequate standards for the protection of Fourth Amendment rights. *Berger* v. *New York*, 388 U. S. 41 (1967). This Court has yet to speak to the retroactive application of the *Berger* case. However, it clearly is not retroactive. The purpose of the *Berger* decision, like that of the other Fourth Amendment decisions of this Court, is to deter unlawful police action. *Desist* v. *United States*, 394 U. S. 244 (1969); *Linkletter* v. *Walker*, 381 U. S. 618 (1965). As this Court has consistently recognized, that purpose is not served by retroactive application of newly-announced rules.

The Court below regarded its decision as based on "old Fourth Amendment law" governed by *Silverman* v. *United States*, 365 U. S. 505 (1961) and made applicable to the states by *Mapp* v. *Ohio*, 367 U. S. 643 (1961). In doing so it relied solely on the distinction it found between trespassory and non-trespassory eavesdropping. It thus completely ignored the fact that there was statutory

authority for the warrants issued in this case. The existence of and compliance with that presumptively valid statute removes this case from the ambit of *Silverman* and makes *Berger* the relevant decision. There can be no doubt of the power of the state legislature to pass a statute regulating eavesdropping in the exercise of its authority to establish rules governing criminal procedure. See *Ker* v. *California,* 374 U. S. 23 (1963). Thus, until Section 813-a was struck down, there was no indication that the state was acting improperly and it was entitled to rely on the statutory provisions with which its officers in good faith complied. Section 813-a was passed before the exclusionary rule was made applicable to the States in an attempt to anticipate new rules and was cast in the language of the Fourth Amendment. Accordingly, it can hardly be said that the State was not justified in relying on that statute. It would, indeed, be anomalous to sanction the situation whereby the decision of this Court holding that known state violation of federal law must be stopped (*Lee* v. *Florida,* 392 U. S. 378 [1968]), is not to be retroactively applied (*Fuller* v. *Alaska,* 393 U. S. 80 [1968]), while a good faith attempt to comply with federal search and seizure standards is to be retroactively disapproved.

The effect of the holding below is to make *Berger* v. *New York, supra,* the only retroactive Fourth Amendment decision among a host of non-retroactive decisions, even though the rationale behind each of the decisions is the same and even though the number of cases affected by a retroactive application of *Berger* is substantial.

2. The instant case raises serious questions as to the consistency of approach to be taken in determining the effective date of prospective decisions.

The body of jurisprudence with respect to the effective date of prospective decisions has undergone significant changes in the relatively brief period since the decision

of this Court in *Linkletter* v. *Walker, supra*. Whereas this Court first determined that the date of finality of the judgment of conviction was the applicable date (*Linkletter* v. *Walker, supra; Tehan* v. *Shott*, 382 U. S. 406 [1966]), it has since explicitly abandoned this approach. *Desist* v. *United States, supra* at 252. (See also *Jenkins* v. *Delaware*, —— U. S. ——, 37 U. S. L. Week 44, 58 (June 2, 1969). The cut-off point for prospective decisions is now much more a function of the purposes of non-retroactivity in general considering particularly the end to be achieved and the relationship of the new rule to the integrity of the fact finding process. *Id.* at 249-50; see also *Johnson* v. *New Jersey*, 384 U. S. 719 (1966); *Stovall* v. *Denno*, 388 U. S. 293 (1967); *Roberts* v. *Russell*, 392 U. S. 293 (1968).

Nowhere is this change in approach more apparent than in the Fourth Amendment area where changes in the law of retroactivity have been paralleled by changes in the law of electronic surveillance. Contrast *Linkletter* v. *Walker, supra*, with *Desist* v. *United States, supra*, and *Silverman* v. *United States, supra* with *Katz* v. *United States*, 389 U. S. 347 (1967). The result of these two lines of development has been an inconsistency in cut-off dates for similar cases which has no jurisprudential support and which, to that extent, undermines the validity of judicial processes.

At the very least the cut-off dates for cases involving electronic surveillance should be the same, the date of the surveillance. The surveillance in the instant case took place before *Berger* v. *New York, supra*, before *Mapp* v. *Ohio, supra*, and before *Silverman* v. *United States, supra*. *Silverman* is the first case to bring electronic surveillance within the Fourth Amendment and *Berger* is the first case to bring state surveillance within the Fourth Amendment, as well as the first case to assess a state statute dealing with such surveillance. Under such circumstances it cannot be said that the eavesdropping in the instant case was an

unreasonable search and seizure. See *Desist* v. *United States, supra* at 254, n. 23. Indeed, the only possible defect in the affidavits was their lack of specificity under standards first applied to the states in *Aguilar* v. *Texas*, 378 U. S. 108 (1964), after respondent's trial and not involving electronic surveillance. The inconsistency now existing is highlighted by the fact that in the instant case both wiretapping and eavesdropping warrants were issued. The wiretapping evidence would not be a basis for habeas corpus relief, but the eavesdropping evidence would be if the decision below stands. The suggestion by the Court below that its conclusion was a foreseeable consequence of *Silverman* v. *United States, supra*, is not sound in view of the state statute. Indeed, this Court no longer relies on the foreseeable consequence argument. (See, *Desist* v. *United States, supra* at 248) since the states are entitled to act on the law as it is, and not as it may become.

This Court should also review this case with a view toward making the entire Fourth Amendment area consistent in terms of the applicable cut off date. *Mapp* v. *Ohio, supra* was decided shortly before respondent's trial concluded. The claim of unlawful eavesdropping was denied on appeal from the judgment of conviction and this Court denied relief for want of a substantial federal question. While his case was in the direct appellate process, the respondent could invoke the principle that when a change in law occurs, it should be decided according to the new law. *United States* v. *Schooner Peggy*, 5 U. S. [1 Cranch] 102 (1801). Indeed, on this principle, this Court considered cases which were in the direct appellate process on the date *Mapp* was decided. *Ker* v. *California*, 374 U. S. 23 (1963); *Fahy* v. *Connecticut*, 375 U. S. 85 (1963); *Stoner* v. *California*, 376 U. S. 483 (1964).

When the judgment of conviction in the instant case was affirmed, it passed out of the direct appellate process. Both *Linkletter* v. *Walker, supra* and *Tehan* v. *Shott, supra*,

were habeas corpus cases in which the convictions had become final prior to the decisions in *Mapp* v. *Ohio, supra* and *Griffin* v. *California,* 380 U. S. 609 (1969). They did not deal with the availability of habeas corpus to persons who had been at trial or in the direct appellate process on the date of those decisions. As this Court held in *Johnson* v. *New Jersey,* 384 U. S. 719, 732:

> "Our holdings in *Linkletter* and *Tehan* were necessarily limited to events which had become final by the time *Mapp* and *Griffin* were rendered. Decisions prior to *Linkletter* and *Tehan* had already established without discussion that *Mapp* and *Griffin* applied to cases still on direct appeal at the time they were announced. See 381 U. S., at 622 an. n. 4; 382 U. S., at 409, n. 3."

In view of this it is submitted that the holdings in *Ker, Fahy* and *Stoner,* applying *Mapp* to cases on direct appeal when that case was decided, should apply only on direct appeal. The habeas corpus applicant, who is no longer in the appellate process, should be entitled to no broader interpretation on collateral attack than the petitioner who completed the appellate process before *Mapp* was decided. The scope of habeas corpus should not vary according to when the direct appellate process comes to an end. The same considerations which dictate consistency in the electronic surveillance area apply with equal force to the entire Fourth Amendment area as do the considerations of the special nature of habeas corpus as opposed to direct review.

3. The instant case presents a serious issue as to the waiver of constitutional claims.

The Court of Appeals for the Second Circuit ordered a hearing on respondent's alleged "confession" claim, even though it acknowledged that the issue had not been raised at trial. This failure to raise the claim should have been deemed a waiver by the Second Circuit. Indeed, it does

not appear that there was anything in the trial record which would support a claim and which would be reviewable on appeal. Respondent did not take the stand and there is no indication by him that the two witnesses were cross-examined with respect to the use of any physical coercion. Since there was no way for a reviewing court to pass on the issue, at the very least, respondent must make a proper collateral application in the state courts so that a record can be developed. Moreover, since the issue of voluntariness concededly did not go to the jury, an application under *People* v. *Huntley*, 15 N. Y. 2d 72 (1965), is inappropriate. With respect to past cases, that case affords a hearing only where the procedure condemned in *Jackson* v. *Denno*, 378 U. S. 368 (1964), was employed. Respondent does not allege that the former procedure prevented his raising the claim nor could he. See *Pinto* v. *Pierce*, 389 U. S. 31 (1967). Thus, the issue has been waived. The Second Circuit in suggesting otherwise has unduly broadened the scope of the *Jackson* decision and has put in issue the question of waiver by failure to object. This issue merits consideration by this Court since it affects vast numbers of cases presently pending in the various federal courts. *Cf.*, *McMann* v. *Ross*, October Term, 1968, No. 1436, presently pending before this Court on application for certiorari.

Moreover, the decision below in suggesting that there was an issue as to coercion, has also greatly exceeded the force of prior decisions of this Court. It appears from the petition that the two witnesses who had talked to the police, elicited statements from respondent by virtue of a demand for money in reply to which respondent indicated knowledge of the case. Even the petition sets forth the facts so that the alleged beating took place after the admissions and thus could not have been a factor in their making. The most that appears is that, at a time when respondent was not in custody, tacit admissions were obtained from him by subterfuge. The fact that subterfuge was used to elicit

the statements does not amount to coercion. See *Lewis* v. *United States*, 385 U. S. 206, 208-209 (1966); see also *Miller* v. *California*, 392 U. S. 616 (1968) in which even the dissent relied on the fact that subterfuge was employed after indictment and during custody in violation of *Massiah* v. *United States*, 377 U. S. 201 (1964) and *Escobedo* v. *Illinois*, 378 U. S. 478 (1964) and not because of the subterfuge itself.

CONCLUSION

For the foregoing reasons the instant petition for a writ of certiorari should be granted.

Dated: New York, New York, July 10, 1969

Respectfully submitted,

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APPENDIX "A"

ORDER

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 Civil 4844

UNITED STATES OF AMERICA ex rel. BURTON N. PUGACH,

Petitioner,

against

VINCENT R. MANCUSI, as Warden of Attica Prison, Attica, N. Y.,

Respondent.

Upon reading the annexed affidavit of Burton N. Pugach, requesting that he be permitted to file his petition for writ of habeas corpus without prepayment of fees or costs or security therefor, and it appearing to the court that this application should be granted, it is

ORDERED, that the filing thereof be and hereby is permitted without prepayment of fees or costs or security therefor, in accordance with Section 1915(a), Title 28, U.S.C., and it is further

ORDERED, that the petition is denied as frivolous pursuant to 28 U.S.C. § 1915(d), since the legality of the petitioner's detention has been heretofore determined on prior applications for habeas corpus, which have been denied for the failure of the petitioner to exhaust his state court remedies, the instant petition presenting no new ground not heretofore presented and determined. 28 U.S.C. § 2244 and § 2254.

Dated: New York, New York, December 8, 1967

SIDNEY SUGARMAN,
Chief Judge

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 505—September Term, 1968.

(Taken on submission
April 10, 1969 Decided May 12, 1969

Docket No. 33345

UNITED STATES OF AMERICA *ex rel.* BURTON N. PUGACH,

Petitioner-Appellant,

—v.—

HON. VINCENT R. MANCUSI, Warden, Attica State Prison, Attica, New York,

Respondent-Appellee.

Before:

FRIENDLY, KAUFMAN and HAYS,

Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Sidney Sugarman, *Chief Judge,* denying a petition for habeas corpus without an evidentiary hearing. Order vacated and cause remanded for further proceedings.

BURTON N. PUGACH, *Appellant pro se, submitted brief.*

Appendix "B"

LOUIS J. LEFKOWITZ, Attorney General of the State of New York (SAMUEL A. HIRSHOWITZ, First Ass't Attorney General, BRENDA SOLOFF, Ass't Attorney General, of Counsel), *submitted brief for Respondent-Appellee.*

FRIENDLY, *Circuit Judge*:

Appellant Pugach, a lawyer, was indicted in 1959 by a New York grand jury for a number of crimes arising out of an alleged conspiracy whereby, using Al Smith Newkirk as an intermediary, he hired Heard Harden and Walter McMillian to maim his former girl friend, Linda Riss, by hurling lye in her face. McMillian and Newkirk pleaded guilty. Pugach and Harden stood trial and were convicted. Pugach was sentenced in 1962 for an aggregate of 15 to 30 years in prison. His conviction was affirmed by the Appellate Division, 21 A.D. 2d 854, 251 N.Y.S. 1007 (1st Dept. 1964) and by the Court of Appeals, 16 N.Y. 2d 504, 260 N.Y.S. 2d 444, and the Supreme Court dismissed his appeal for want of a substantial federal question, 373 U.S. 575 (1966).

Pugach has mounted an almost unparalleled succession of collateral attacks on his conviction both in state and in federal courts. The number of these applications, the diffuse and repetitive manner of their presentation, and Pugach's insistence that no counsel be assigned have served to conceal any possible merit that may lie in them. His course of action also invited dismissal of federal habeas corpus petitions, as apparently occurred here, under the rule of *Terry* v. *Denno*, 254 F. Supp. 909 (S.D.N.Y. 1966), that such a petition presenting a claim concerning which state remedies had been exhausted should be dismissed if it also presented a claim or claims concerning which

they had not been. We disapproved this rule subsequent to the decision below, *United States ex rel. Levy* v. *McMann*, 394 F. 2d 402 (2 Cir. 1968).

Careful study of Pugach's appeal papers reveals at least two grounds of attack which on their face are not so lacking in merit as to warrant denial without a hearing. One concerns the bugging of Pugach's law office. Ten days after the crime the police submitted to a state judge an affidavit reproduced in pertinent part in the margin.[1] Permission to install hidden microphones in Pugach's office was granted. Some four months later, the microphones picked up a conversation between Pugach and McMillian wherein Pugach allegedly admitted paying McMillian and one Joe Louis for throwing lye in Miss Riss' face. This evidence was introduced over objection. The objection was renewed without success when the Supreme Court decided *Mapp* v. *Ohio*, 367 U.S. 643 (1961), before the trial was over and was pressed on appeal, and there is no contention that state remedies have not been exhausted with respect to it.

Pugach claims that *Mapp* applied to the states the previous Federal law that evidence obtained by planting a bug inside a suspect's premises "without warrant and without consent" is obtained in violation of the Fourth Amendment, *Silverman* v. *United States*, 365 U.S. 505, 512 (1961),

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[1] ". . . the Police Department of the City of New York is conducting an investigation into the crimes of maiming and felonious assault recently committed in Bronx County.

"Your deponent has come into possession of certain confidential information which causes him to believe that persons with knowledge of the aforesaid crimes are communicating, conversing, and discussing these crimes in Room No. 812, in premises No. 349 East 149th Street, Bronx County.

"Deponent believes that if the Police Department is allowed to overhear and/or record conversations in such room, valuable information may be obtained which would lead to the arrest of the perpetrators of the aforesaid crime."

and that, despite *Linkletter* v. *Walker*, 381 U. S. 618 (1965), this rule must be applied to his case, which was still being tried when *Mapp* came down. He says that *Silverman* treated traspassory bugs as the equivalent of searches, and this approach implied that judicial permission to plant a bug, which was not supported by an adequate showing of probable cause, was as invalid as a search warrant issued without such a showing would be. The argument equating trespassory bugs with searches was later sustained in *Berger* v. *New York*, 388 U.S. 41, 49-50, 54-56 (1967), which struck down the very New York statute that was the source of the authority for the eavesdropping here. The Supreme Court's opinion also intimated that even an adequate showing of probable cause might not justify long continued and pervasive eavesdropping. 388 U.S. at 56-60.

Apparently not disputing that the receipt of evidence obtained by anything like the eavesdropping of Pugach's office would now be constitutionally forbidden, the State contends that the *Berger* decision was not retroactive and cites *People* v. *Kaiser*, 21 N.Y. 2d 86, 97-98, 286 N.Y.S. 2d 801, 809-11 (1967), aff'd, — U.S. —— (1969), 37 L.W. 4236, to that end. The citation is inapposite. *Kaiser* was a case of non-trespassory wiretapping, not of trespassory bugging. Wiretaps were brought under the Fourth Amendment only by *United States* v. *Katz*, 389 U.S. 347 (1967), which overruled the contrary long-standing rule of *Olmstead* v. *United States*, 277 U.S. 438 (1928) and has been held in consequence to apply only to wiretapping illegally conducted after December 18, 1967. *Desist* v. *United States*, —— U.S. —— (1969), 37 L.W. 4225. Trespassory bugging is a different story. The *Berger* holding that this violated the Fourth Amendment unless supported by probable cause was a foreseeable application of *Silverman*, and we see no reason to doubt that at least so much of *Berger*

as insists on an adequate showing of probable cause is old Fourth Amendment law which *Mapp*, as explicated in *Linkletter*, makes applicable to the states in cases pending when *Mapp* was decided, as *Silverman* itself has been held to be. *Clinton* v. *Virginia*, 377 U.S. 158 (1964). Whether even more of *Berger* may be retroactive, we need not now decide. Since the State does not seek to sustain the sufficiency of the affidavit, which both Judge Foley, 212 F. Supp. 828 (N.D.N.Y. 1962) and Judge Bonsal, unreported, S.D.N.Y., 67 Civ. 365, April 12, 1967, have condemned, Pugach is entitled to a hearing at which the State may show, if it can, that the judge had other sufficient information before him either when the bugging was initially authorized or on the extensions of the authority.[2] We leave open whether even if that burden is met, Pugach may still not be entitled to relief because of the duration of the bugging and the lack of particularity of the warrant. The court should also consider whether, if evidence obtained through the bugging was obtained in violation of Pugach's Fourth Amendment rights, its admission can be deemed harmless error. We note in this connection the statement of the New York Court of Appeals in *People* v. *McCall*, 17 N.Y. 2d 152, 159-60, 269 N.Y.S. 2d 396, 402-3 (1966), that in the *Pugach* case "the eavesdropping by police based on a judicial order and affidavit rather similar to that in the present case played a small part in an overwhelmingly strong record which contained many other similar admissions made by the defendant."

A second claim that appears to warrant a hearing concerns admissions allegedly coerced by the police. Pugach claims that at the trial Alan MacGladding, an ex-convict, testified that he and Jose Monteira, another ex-convict, in

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[2] While the state tells us the affiant is dead, the judge who authorized the bugging apparently is alive.

the "latter part of September 1959" had "conversations with members of the Police Department," as a result of which they went to Pugach's office, where they threatened to turn him in about the lye-throwing if not paid off. According to MacGladding, Pugach then denied guilt but also "turned pale, perspired in his face and he slumped all the way in his chair"—a circumstance which, standing alone, could be deemed immaterial. However, Monteira testified that the following conversation took place:

> We told him we want $10,000, no ifs and buts, we want ten thousand bucks now. So he said: "Well, I haven't got $10,000 but I have $300. We told him—I told him myself to 'shove the $300 up his ass'. . . ." Then he said "Well, let's suppose that I was involved in this. . . ."[3]

On October 6, 1959, the two thugs returned to Pugach's office, and he claims that they beat him up. He also claims that MacGladding testified that on October 6 Pugach said that "the only person that could hurt him was Preacher McMillian, Al Newkirk, and Heard Harden."

While no argument was made at the trial that these remarks were the fruits of illegal coercion of petitioner, Pugach alleges he raised the point on appeal. It is clear that during the pendency of his appeal Pugach asked for a hearing with respect to this statement pursuant to *Jackson* v. *Denno,* 378 U.S. 368 (1964), and this was refused. *People* v. *Pugach,* 14 N.Y. 2d 976 (1964). It would thus seem that state remedies were exhausted but there is still a question whether Pugach waived his objection to this evidence by not making it at the trial. The circum-

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[3] Pugach's affidavit does not reproduce the rest of the conversation, and the state trial record, which is being used in one of Pugach's state *coram nobis* proceedings, is not available to us.

stances with respect both to the coercion and the waiver are sufficiently in controversy that a hearing should be had.

Since a hearing must be had on these two claims, we think it best that it also embrace Pugach's less persuasive claims that the prosecution used testimony known to be perjured or at least failed to make available to the defense material known to cast doubt on its veracity, and, if state remedies are found to have been exhausted, his assortment of claims with respect to competency at trial and on appeal. On the other hand, the district courts need no longer concern themselves with Pugach's frivolous claim that the indictment did not adequately inform him of the charges, an issue correctly ruled against him by Judge Palmieri, not officially reported, S.D.N.Y., 68 Civ. 1842, June 17, 1968, in a decision that was not appealed.

We think the time has come—in fact that it came long ago—when Pugach's efforts to obtain federal habeas corpus should be placed in one bundle in order to avoid undue drain on the time of district judges and of this court. At the moment Pugach has at least three other habeas petitions pending in the district courts. One, before Judge Ryan in the Southern District of New York, contains the same points concerning eavesdropping, insufficiency of the indictment, and suppression of evidence, that are made on this appeal. Another, before Judge Weinfeld, also in the Southern District of New York, alleges lack of competent representation at trial. Still another petition is pending before Judge Curtin in the Western District of New York. We respectfully suggest to Chief Judge Sugarman that the two petitions now pending in the Southern District of New York and the issues here remanded for hearing be referred to a single judge. We also suggest that the Attorney General move for the transfer from the Western to the Southern District of New York of the petition pending in the former district, 28

U.S.C. §2241(d); when so transferred, it can be assigned to the judge designated to hear the other Pugach petitions in the Sotuhern District. We also place Pugach on notice that if he has still other federal claims, these must be promptly asserted along with the ones now pending.

The order dismissing the petition is vacated and the cause remanded for further proceedings consistent with this opinion.